No. 82-1071

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS IN SUPPORT OF REVERSAL

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The briefs of the respondents and their supporting amici demonstrate that they seek to wage in the courts the very "regional civil war" over access to federal power resources that Congress sought to prevent. H.R. Rep. 96-976, 96th Cong., 2d Sess., Pt. I, at 26-27 (1980); Pet. App. D-65. They may, of course, pursue their claims in the legislative forum. But, for the time being, the parties and the courts must accept the resolution of the complex economic and social issues that Congress ordained when it exhaustively reviewed the situation in the affected region of the country and passed the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Regional Act), 16 U.S.C. 839 *et seq.* While broader concerns form the backdrop of this litigation, they should not deflect attention from the straightforward legal issues that are now at center stage.

The only questions properly before the Court relate to the meaning of the Regional Act and the reasonableness of the construction given its relevant provisions by the Bonneville Power Administration (BPA). Because the respondents and amici venture far afield from the core issues, our reply will attempt to return the focus to the only legal questions presented, explaining why the respondents' arguments are largely irrelevant. Finally, we will discuss some of the specific contentions they set forth in order that they may be properly understood.

1.a. Our earlier briefs (Gov't Pet. Br. 2-3; Gov't Br. 2-6)[1] explained the history of federal provision of hydroelectric power in the region and the struggle that had emerged by the mid-1970s among classes of customers seeking to preserve their share of this lower-cost power in the face of predicted shortages. As it stood, no class of customers—including preference customers—could be assured of receiving all the power it needed.[2] Congress then set about the task of fashioning an allocation plan

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[1] "Gov't Pet. Br." refers to the Brief for the Federal Respondents in support of the petition for a writ of certiorari; "Gov't Br." refers to the merits Brief for the Federal Respondents in Support of Reversal. "CL Br." refers to the Brief for Respondents Central Lincoln Peoples' Utility District, et al. "PPC Br." refers to the Brief of Respondent Public Power Council. "IOU Br." refers to the Brief for Respondents Portland General Electric Company, et al. "APPA Am. Br." refers to the Brief Amicus Curiae by the American Public Power Association, et al.

[2] Under the proposed BPA administrative allocation plan that preceded the Regional Act, even preference customers would not have received their full firm power requirements. H.R. Rep. 96-976, 96th Cong., 2d Sess., Pt. II, at 30-31 (1980); Pet. App. E75-E76. Accordingly, the public utility respondents' suggestion that the Act somehow deprives them of something they would have had is demonstrably untrue. Without the Act, BPA's preference customers would have been "limited to a pro rata share of BPA power after 1991. Unfortunately, these shares will fall far short of meeting their requirements * * *." *Ibid.*

that accommodated a myriad of conflicting interests. In this compromise, no class of customers got all it wanted; concessions were required of each in order to create a satisfactory plan of allocation for all.

With specific reference to the direct service industrial customers (DSIs), the Regional Act effectively compelled the abandonment of contracts entered into in 1975. In addition, the DSIs were subject to paying substantially higher rates, in part to offset the costs BPA would incur under the residential exchange program that provided lower-cost federal power to customers of investor-owned utilities (IOUs). See Gov't Pet. Br. 3-4; Gov't Br. 7-8; H.R. Rep. 96-976, *supra*, Pt. I, at 29; Pet. App. D69; 126 Cong. Rec. 30184 (1980) (remarks of Sen. Hatfield) ("This bill will mean, in effect, a saving of $1 billion in the next 10 years for the ratepayers of Oregon, with the revenue slack being made up by the direct-service industrial customers who will get renewed long-term contracts in return for the higher rates that they will pay."). On the other side of the ledger, these concessions by the DSIs were counterbalanced by certain benefits. First, the Regional Act required BPA to offer its existing DSI customers long-term contracts for the sale of an amount of power equivalent to their entitlements under the 1975 contracts. Moreover, the Regional Act reduced the circumstances under which a portion of the DSIs' purchases—the top quartile—could be interrupted for use by preference customers.[3] The effect of this change was to assure the DSIs of a more reliable source of power for a longer period of time than they enjoyed under the 1975 contracts.

A similar process of give-and-take affected all classes of customers. We focus here on the DSIs, because it is the new DSI contracts that gave rise to this litigation.

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[3] Under the 1975 contracts, the top quartile, or 25% of the DSI load, was "nonfirm" and subject to interruption at any time and for any reason. The Regional Act altered the terms of restriction for the top quartile; it was sold "as if it were firm" and could be interrupted only to satisfy BPA's firm load needs.

In so doing, however, we do not lose sight of the fact that the statutorily mandated DSI contracts are but one thread of the intricate tapestry of the Regional Act;[4] if, as the court of appeals held, that thread is to be removed the whole fabric of the Act would unravel.

b. Our argument in support of the Administrator's decision to offer the new DSI contracts is rooted in the statutory language. Section 5(d)(1)(B) requires that "the Administrator shall offer * * * to each existing direct service industrial customer an initial long term contract." 16 U.S.C. 839c(d)(1)(B). See also Section 5(g)(1) (16 U.S.C. 839c(g)(1)). On this point there is no dispute.

The parties go separate ways over the interpretation of other language in Section 5(d)(1)(B), the portion requiring that the new DSI contracts offer an "amount of power equivalent to that to which such customer is entitled under its [1975] contract." The basis for the disagreement is quite narrow. Thus, the briefs in this Court do not dispute that the old and new contracts both sold the same number of kilowatts.[5] The BPA Administrator concluded that the sale of the same number of kilowatts satisfied the statutory directive to sell an equivalent amount of power. 46 Fed. Reg. 44348 (1981). This would appear to be unexceptionable. Yet respondents object (CL Br. 31-34; PPC Br. 11; IOU Br. 13-16; APPA Am. Br. 23). They claim that since the top quartile of DSI power cannot be interrupted to make nonfirm sales to respondents, as the 1975 contracts permitted, that the

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[4] In addition to requiring BPA to sell power to DSI's the Regional Act also required for the first time that BPA make sales to privately-owned utilities. While BPA had made such sales in the past, when surplus power was available, it was under no statutory directive to do so.

[5] See BPA's Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review (at 19-21), a brief filed in the court of appeals which compares the number of kilowatts sold in the old and new contracts and explains why certain de minimis differentials exist. See J.A. 20.

amount of power sold is not equivalent because there will be more hours in which DSIs receive power for the top quartile. This misses the point. Despite respondents' highly technical argument, the fact remains that the 1975 contracts and the new contracts provide for the sale of the same amount of power virtually down to the last kilowatt—there is not the slightest difference in *amount* and that is just what the statute requires.

The different terms of interruptibility not only do not alter the total contractual amount, but also are required by the Regional Act. Whereas in the past the top quartile of power sold to DSIs could be interrupted for any reason, Section 5(d)(1)(A) of the Regional Act, 16 U.S.C. 839c(d)(1)(A), specifies that sales to DSIs "shall provide a portion of the Administrator's reserves for firm power loads." Under Section 3(17) (16 U.S.C. 839a (17)), "reserves" means "the electric power needed to avert * * * shortages for the benefit of firm power customers * * * available to the Administrator * * * from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers." [6] When these provisions are read together, two important points become clear. First, interruption is permitted only to satisfy firm power needs (see note 6, *supra*)—this is precisely the change implemented in the new DSI contracts. Second, the DSIs' top quartile is intended to serve as a reserve for such firm power needs when and if they arise. Reserves provide additional energy, available when needed, to satisfy firm load requirements without acquiring additional generation facilities that would stand idle

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[6] The report of the Senate Committee on Energy and Natural Resources clearly explains: "the term 'firm power customers of the Administrator' is intended to mean the firm power loads of such customers. It is not intended that the Administrator's reserves will be used to protect other than firm loads." S. Rep. 96-272, 96th Cong., 1st Sess. 23 (1979); Pet. App. F47-F48. This congressional comment fully answers respondents' argument (IOU Br. 16) that the reserves could be used for other than firm loads.

until such need arises. The preservation of this additional capacity is much less expensive, and less wasteful, than the alternatives of maintaining idle facilities or of purchasing power elsewhere at higher rates. Without this reserve, BPA obviously could not comply with the statutory directive that reserves be maintained or BPA would be relegated to the more expensive alternatives for satisfying customers' firm needs.[7]

It is therefore irrelevant to suggest, as respondents do (CL Br. 36), that these reserves could be satisfied by the sale of nonfirm power to others. The Regional Act clearly assigns to the DSI load the obligation to be available as a reserve. Fidelity to the statute requires that this congressional determination be upheld.

c. While we believe that this case may be resolved in favor of the BPA Administrator's decision solely on the basis of the statutory language, further support for our position is provided by the legislative history—as even the court of appeals acknowledged. Pet. App. A10 & n.7.

The manner in which the new DSI contracts dispose of the top quartile was expressly considered and approved by Congress. In response to an inquiry from the Chairman of the Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs, BPA's Administrator explained how the DSIs' load would be served (Pet. App. I23). The language of the Administrator's response was adopted verbatim in the House Interior and Insular Affairs Committee report (H.R. Rep. 96-976, *supra*, Pt. II, at 48-49; Pet. App. E106-E107)

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[7] Aside from the additional outlays that would be required by the alternatives of building new facilities or purchasing power on the open market, there is a further cost involved in eliminating the top quartile reserve from the DSI allocation. The DSIs pay higher rates than preference customers (DSIs pay 26.8 mills per kilowatt hour for top quartile nonfirm energy as opposed to respondents' standard rate for nonfirm energy of 18.5 mills, the spill rate of 11 mills, or the coal displacement rate of 7 mills; BPA, U.S. Dep't of Energy, *WP-83-A-02, Administrator's Record of Decision*, Rate Scheds. D-10-12 & D-44-45 (Sept. 1983)).

and approved by the former and present Chairmen of the Senate Committee on Energy and Natural Resources. 126 Cong. Rec. 30180, 30187 (1980); Pet. App. J2. Against this background of congressional ratification, the language of the House Interior and Insular Affairs report was copied virtually verbatim in the Administrator's decision (46 Fed. Reg. 44348 (1981)) and the new DSI contracts (Pet. App. H1). In these circumstances, it is extraordinary to hold, as the Ninth Circuit did, that BPA's faithful adherence to express congressional intent was unreasonable.

d. In our view, the case boils down to two straightforward propositions. First, that Congress intended that the challenged provisions of the new DSI contracts take their present form. This much is clear from the statutory language and the legislative history. Second, that BPA's construction of the Regional Act is faithful to congressional intent, and even if there is some question on this point, BPA's view is a reasonable one that is entitled to judicial deference. See *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20.

2. The principal thrust of the arguments put forward by respondents and the amici curiae relates not to the Regional Act's treatment of the DSIs, but rather to the statutory preservation of "preference" for public utilities.

The fact is, however, that the present case does not call into question the principle of "preference" in all its various statutory permutations in other legislation. See APPA Am. Br. 4. Indeed, the preference issue need never be reached in deciding this case. "Preference" is a statutory creation that has meaning only when there are competing demands for the same power. In the Regional Act, Congress established a statutory plan of allocation that accommodates competing demands at least for the 20 year duration of the initial contracts.[8] See 126 Cong.

[8] Sections 5(d)(1)(B) and (g)(1) require BPA to offer *initial* long-term contracts to existing DSI customers. Moreover, Section

Rec. 30179 (1980) (remarks of Sen. Jackson) (the Regional Act is intended to ensure that "the allocation issue is resolved promptly through legislation"); Pet. App. J1; 126 Cong. Rec. 29801 (1980) (remarks of Rep. Kazen) ("uncertainties [as to allocation of power] can only be resolved through enactment of the legislation before us today"). By granting the DSIs a statutory entitlement to the equivalent amount of power involved in their 1975 contracts, this portion of BPA's sales is now not subject to competing demands and is accordingly beyond the scope of the preference clause. Thus, as the private utility respondents acknowledge (IOU Br. 3 n.7), if Congress committed this power to the DSIs, the case is over. As we have said, our primary submission is that the Regional Act, construed in light of the clear statements by Senator Jackson and Congressman Kazen,[9] embodies a legislative allocation scheme that moots any question of the preference.

If the preference issue is reached, it must be placed in its proper perspective. Power generated by federal power marketing agencies such as BPA is federal property. Accordingly, Congress may dispose of this property as it desires. *Ashwander* v. *TVA*, 297 U.S. 288 (1936). Thus,

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5(g)(7) (16 U.S.C. 839c(g)(7)), which deems BPA to have sufficient resources for entering into such contracts, also refers only to *initial* contracts. Thus, while BPA is authorized by Section 5(d)(1)(A) to offer subsequent contracts, such future contracts are not mandated and will be offered only if there are no competing applications for power by preference entities. See Pet. App. M1-M2.

[9] Senator Jackson was Chairman of the Senate Committee on Energy and Natural Resources (see Pet. App. F1); Congressman Kazen was Chairman of the Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs (see Pet. App. I1). Similar expressions of the legislative intent to establish a statutory scheme of allocation are contained in the committee reports of both houses of Congress. *E.g.*, H.R. Rep. 96-976, *supra*, Pt. I, at 26-27; Pet. App. D64-D65; H.R. Rep. 96-676, *supra*, Pt. II, at 26; Pet. App. E67; S. Rep. 96-272, *supra*, at 14-16; Pet. App. F34-F35. See also Pet. App. G2-G3, L1 (remarks of Rep. Foley) ("[t]he bill's allocation system is the heart of the regionally-negotiated 'peace' settlement * * * ").

Congress may allocate federal power among preference and nonpreference entities in accordance with its view of the public interest in the specific instance. And, on numerous occasions Congress has determined that the public interest is best served by sales to nonpreference customers or by creation of a "preference within a preference" favoring a specified geographic area (including nonpreference users in the area) over public entities otherwise entitled to preference.[10]

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[10] The Niagara Power Project Act, 16 U.S.C. 836 *et seq.*; Boulder Canyon Project Act, 43 U.S.C. (& Supp. V) 617 *et seq.*; and the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831 *et seq.*, all contain provisions that have been found to dispose of federal power to nonpreference entities. Boulder Canyon Project Act provisions requiring that nonpreference customers be offered contract renewals notwithstanding preference are discussed in *Citizens Utilities Co.* v. *United States*, 149 F. Supp. 158 (Ct. Cl.), cert. denied, 355 U.S. 892 (1957). TVA Act provisions that justified TVA in denying a preference customer the opportunity to serve an industrial customer and let TVA serve the load directly are discussed in *Volunteer Electric Cooperative* v. *TVA*, 139 F. Supp. 22 (E.D. Tenn. 1954), aff'd, 231 F.2d 446 (6th Cir. 1956). The Niagara Power Project Act offers detailed provisions regarding power allocation. It divides the power produced at the Niagara Project equally among preference and nonpreference customers. 16 U.S.C. 836(b). See *Municipal Electric Utilities Association* v. *Power Authority*, 21 F.E.R.C. ¶ 61,021, at 61,130 (Oct. 13, 1982). Finally, BPA markets power from the Hanford Steam Plant, a project that utilizes by-product steam to generate electricity. Fifty percent participation in the project must be offered to private utilities. Act of Sept. 26, 1962, Pub. L. No. 87-701, § 112(e), 76 Stat. 604.

Statutes that create a preference within a preference are also common. The Niagara Power Project Act provides that 80% of the preference power is to be provided to public bodies of the State of New York "within * * * economic transmission" distance of the project. 16 U.S.C. 836(b)(2). BPA itself markets power pursuant to two statutes that create geographic preferences. The Hungry Horse Dam Act, 43 U.S.C. 593a, as reaffirmed by Section 12(f) of the Regional Act, 16 U.S.C. 839g(f), creates a "Montana reservation" that requires BPA to make the electric energy generated at the project available "primarily * * * in the State of Montana." The Pacific Northwest Consumer Power Preference Act, 16 U.S.C. 837 *et seq.*, prohibits BPA from selling federal hydro power outside the Pacific Northwest when there is a market for such power within the

Congress has made such an allocation here. And the fact that preference would operate in a manner that differs from its application in other federal statutes was certainly known to Congress and was expressly addressed in Section 10(c) of the Regional Act, 16 U.S.C. 839g(c). See H.R. Rep. 96-976, *supra*, Pt. I, at 34-35, 73-74; Pet. App. D78, D143. For this reason, the Court does not have before it, and has no occasion to decide, the abstract question of "preference" as a Platonic ideal applicable to all federal power legislation. Rather, the case involves the role of preference, if at all, only within the framework of the Regional Act.

b. With respect to the Regional Act, respondents and amici appear to argue (CL Br. 1, 19, 23, 24, 26, 28-29, 43; PPC Br. 1, 5, 7, 9-10, 12, 19, 26; IOU Br. 11; APPA Am. Br. 1, 6 n.15, 7, 9, 19, 20, 26) that the Act reaffirmed preference as to *all* power sold by BPA at *all* times or, alternatively, that preference is reaffirmed as to nonfirm power (APPA Am. Br. 2-4; PPC Br. 11). Both versions of this argument are incorrect.

The assertion that preference extends to all BPA power is contrary to historical fact and to express statutory language. Even prior to the Regional Act, BPA sold power to nonpreference customers such as the DSIs (*e.g.*, the 1975 contracts). Indeed, it has done so since 1939, shortly after passage of the original Bonneville Project Act. See G. Norwood, *DOE-BP-7, Columbia River Power for the People—A History of Policies of the Bonneville Power Administration* 133, 328 (1981). If respondents are correct that preference is an "all-encompassing" (CL Br. 19) concept that applies to all BPA power sales, then

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region. This is so even where there is a non-Pacific Northwest preference customer applicant competing with a Pacific Northwest nonpreference customer for purchase of the power. 16 U.S.C. 837-837h. Regional preference was extended in the Regional Act to include thermal power. § 9(c), 16 U.S.C. 839f(c). Both of these Acts reserve to BPA's Pacific Northwest nonpreference customers first priority to power marketed by BPA ahead of competing applications from preference customers in other regions.

presumably BPA could never have sold power to the DSIs (or to privately owned utilities or federal agencies) under contracts that did not allow BPA to terminate sales for three-quarters of the contractual total because of a subsequent preference application. Yet BPA had done just that in the 1975 contracts, and those contracts were certainly known to Congress when it passed the Regional Act.[11] Moreover, if preference extends to all power sales by BPA at all times, as respondents suggest, then the express provisions for sales to DSIs (as well as those for IOUs and federal agencies) would be written out of the Act. If respondents are correct, there was no need for the Regional Act at all; Congress could have stopped after reaffirming preference in 16 U.S.C. 839c(a) and even this was unnecessary because it merely repeated the preference that existed under the prior statute. At most, Congress could have authorized BPA to acquire additional resources and otherwise left the system to operate as it had in the past. But, as Congress was well aware, that would not have averted the "civil war" that was raging. See note 2, *supra*. More was required; and more was intended, as the complex statute that comprises 75 pages in the appendix to the petition attests.

In contrast to respondents' myopic focus on the preference clause, BPA's interpretation treats the Regional Act as an organic whole in which each provision has meaning and substance. Thus, the allocation carved out for the DSIs is but one current in the ebb and flow of concessions and benefits created by the Regional Act.[12] Rather than

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[11] Congress expressly referred to the 1975 contracts in the Regional Act. § 5(d)(1)(B), 16 U.S.C. 839c(d)(1)(B).

[12] As Senator Jackson stated (126 Cong. Rec. 30179 (1980); Pet. App. J1):

> The bill before us is the result of a legislative process of consensus and compromise in which an effort has been made at every stage to accommodate the views of every interest group and every member of the Northwest delegation to the maximum extent possible.

a mere reiteration of preference that leaves the position of the public utilities unchanged in every respect and the remaining classes of customers to fend for themselves, the Regional Act offers a thorough and comprehensive legislative solution to the pressing problem of allocation. BPA's position, unlike that of respondents, is the only one that integrates the DSI allocation into the whole statute and the only one that breathes life into all of its provisions. As we have described earlier, BPA's construction comports with the statute's directive and authorization that sales be made to preference customers, to privately-owned utilities, to federal agencies and to DSIs; and it does so in a way that preserves the preference for all uncommitted power remaining. Under BPA's implementation of the Act, the public utilities will continue to have a preference for all power not allocated elsewhere by Congress and the firm loads of the public utilities are protected by the reserves created by the DSIs' top quartile. Finally, unlike respondents' view, in which Section 5(f) (16 U.S.C. 839c(f)) is written out of the Act, BPA's construction blends that Section into the structure of the Act by providing that surplus sales are made only after BPA has fulfilled its obligations to all customers, including DSIs.[13] In short, BPA's is the only interpretation

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[13] Respondents greatly exaggerate (CL Br. 24-27; APPA Am. Br. 14-15) the role of their opposition to Section 5(f) and the congressional response. It is true that APPA opposed S. 3418, an earlier version of the legislation that eventually passed, because it believed that Section 5(d) (which became Section 5(f) in the Regional Act) "subordinates the preference provisions of the Bonneville Project Act to new rights created for private power companies and direct service industries." *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess., Pt. 2, at 1069 (1978) (testimony of Alex Radin). APPA also urged Congress to clarify that sales to nonpreference customers would be only from surplus power, and that all power sales would be subject to preference.

Congress accepted only part of the APPA proposal. While Section 5(a) was revised to state that sales were subject to the prefer-

that would enable the Act to be implemented as it was intended. But even if other interpretations are plausible, it is enough that BPA's reading of the Act is a reasonable one. We deal here with a complex statute as to which the views of the implementing agency should be accorded deference.

c. The suggestion that the Regional Act mandates preference for all nonfirm power fares no better. It offers no explanation for the statutory definition of the public utilities' preference in terms of "electric power to meet the *firm power* load of such public body." § 5(b)(1), 16 U.S.C. 839c(b)(1) (emphasis added). And it runs directly counter to Congress's statement that it was "not intended" for reserves to be "used to protect other than firm loads." S. Rep. 96-272, 96th Cong. 1st Sess. 23 (1979); Pet. App. F47-F48.

3. Respondents and amici make a few additional assertions that warrant brief response.

a. Respondents argue (CL Br. 14 n.36) that the new DSI contracts are not needed to underwrite the cost of the residential exchange program because those costs are instead shouldered in large part by the public utilities. To support this contention the public utility respondents make the incorrect and misleading assertion that they are paying $250 million of the costs of the residential exchange program under BPA's current rates. This figure greatly distorts the actual impact of the residential exchange on the public utilities because it reflects only one

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ence provisions of the Bonneville Project Act, the offending provisions of Section 5(f) were retained, along with statutory language requiring sales to nonpreference customers. Moreover, the Senate Committee on Energy and Natural Resources added to the legislation, for the first time, the "deemer" concept (Section 5(g)(7): "[BPA] shall be deemed to have sufficient resources for the purpose of entering into the initial contracts * * *") which was intended to resolve any competing applications for power by preference entities.

Congress therefore, in one of the myriad compromises required to solve the pending energy shortage, struck a balance between APPA's all-or-nothing approach and the pending bill, which did not mention preference.

step in BPA's cost allocation process. That is, it reflects the *gross* cost of exchange resources allocated to the entire Priority Firm Power Class. But the public utilities represent only one-half of the power load of that class. Taking into account other factors overlooked by the respondents results in an accurate calculation of the impact of the exchange program, which is approximately $3 million.[14]

Their argument is also incorrect as a matter of statutory interpretation. See Section 7(c)(1)(A) of the Act, 16 U.S.C. 839e(c)(1)(A). Moreover, the House committee report states that the DSIs "will also pay significantly higher rates * * * [to] permit the Administrator to enter into * * * [the] exchange" program. H.R. Rep. 96-976, *supra*, Pt. I, at 29; Pet. App. D69.

Before the Regional Act, the rates for DSIs and public utilities were essentially the same because BPA allocated a single pool of power costs to all firm power customers.[15] Finklea, *Bonneville Power Administration Ratemaking: An Analysis of Substantive Standards and Procedural Requirements*, 13 Envtl. L. 929, 941 (1983). On the other hand, under BPA's present rates, as approved on an interim basis by the Federal Energy Regulatory Commis-

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[14] First, the actual impact on the Priority Firm rate class is not the total exchange costs of $269,470,000 (BPA, U.S. Dep't of Energy, *Cost of Service Analysis*, Tables 6, 7, 8 (Sept. 1983)), but is the difference between the exchange costs and the cost of an equal amount of less-expensive Federal Base System power, a net cost of $74,572,000. Second, the public utilities represent only 46.67% of the Priority Firm class. Thus, their share of the increased cost is $34,756,000. Finally, by participating in the exchange program, the public utilities receive benefits of $31,495,000, resulting in a net cost of $3,261,000 (*id.* at Table A-1).

[15] In fact, the DSIs' rate was less than the rate for firm power sales to publicly-owned utilities, to reflect lower unit costs to serve the DSIs. It was less costly for BPA to serve the DSIs because of their high load factor and the restriction rights BPA could exercise on sales of power to the DSIs to protect firm loads. BPA's 1979 wholesale power rate for publicly-owned utilities was 7.25 mills per kilowatt hour, while BPA's rate for sales to the DSIs was 6.7 mills per kilowatt hour.

sion, the DSIs pay 4.8 mills per kilowatt hour more than the public utilities. BPA, U.S. Dep't of Energy, *Issue Backgrounder: BPA's Electric Power Rates* (Oct. 1983). The primary reason for this difference is that BPA recovers the bulk of the exchange program costs from the DSIs.

b. Respondents claim that BPA's interpretation of the DSI load has changed by citing (CL Br. 11 n.29) a 1956 opinion of the Regional Solicitor stating that preference applies to nonfirm power. By its terms, however, that opinion assumes that the nonfirm power under discussion has not been allocated and is still available for allocation pursuant to preference. By contrast, the nonfirm power at issue here has been allocated—by unambiguous statutory directive. And power that has already been allocated is not subject to a claim of preference. See *BPA's Obligations to Industrial Customers*, Op. of Regional Solicitor (Oct. 31, 1974). The 1974 opinion, which involved power previously committed by contract, concluded that BPA will not interrupt service to an industrial customer served under an existing contract to provide power to a new preference entity. Accord, *City of Anaheim* v. *Kleppe*, 590 F.2d 285 (9th Cir. 1978). The conclusion drawn in 1974, which was available to Congress as part of the administrative background for the Regional Act, is more forcefully applicable here, where the underlying allocation has been made by Congress.

c. It is suggested (APPA Am. Br. 17-18) that BPA's construction of the Regional Act would frustrate conservation. In support of this contention, amicus APPA cites a General Accounting Office recommendation that BPA should gradually decrease the amount of power allocated to DSIs to the amount needed to run modernized plants.

This argument is substantially undercut by APPA's concession (APPA Am. Br. 18) that "[t]he committee did not accept the GAO recommendations designed to reduce the DSI's entitlements in the precise manner suggested." This is an understatement. Not only did Con-

gress object to "the precise manner suggested" by GAO, it rejected GAO's proposals outright. Instead of reducing the DSI entitlement, as GAO advised, the Regional Act directs BPA to provide the DSIs the same amount of power that was provided under the 1975 contracts. 16 U.S.C. 839c(d)(1)(B).

The legislative history demonstrates why Congress rejected GAO's suggestion. In hearings before the House Committee on Interstate and Foreign Commerce, GAO Deputy Director Douglas McCullough urged that "[b]efore Bonneville is authorized to offer the industrial customers new long-term contracts, we believe the bill should be amended to assure industrial conservation of electricity * * *." *Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 170 (1979). In response, counsel for the DSIs stated that the conservation provisions of H.R. 3508 applied equally to all BPA customers, including DSIs, and that the primary incentives for DSI conservation were greatly increased rates and Congress's fixing for 20 years an upper limit on the amount of power that an existing DSI could receive. *Id.* at 321.

The committee considered the arguments and rejected the GAO position. Instead, it applied the Act's conservation provisions equally to all customers. The committee report notes first that DSIs should "do their part." The report then states that the fixed amounts of power and the increased rates will provide the incentive for DSI conservation: "This limitation [fixing an upper limit on the amount of power unless additional sales are approved by the Regional Council] and the amount of power available to DSI's should serve as significant incentives for the DSI's to conserve that power for the purpose of additional DSI production." H.R. Rep. 96-976, *supra*, Pt. I, at 63; Pet. App. D124-D126.

The Act as finally passed recognized that the economic market place and not the law would be the driving force

behind DSI conservation. The current rates are more than 50% higher than anticipated for fiscal year 1984. S. Rep. 96-272, *supra*, at 70; Pet. App. F90; BPA, U.S. Dep't of Energy, *Issue Backgrounder: BPA's Electric Power Rates* (Oct. 1983). Moreover, the Act's only specific reference to DSI conservation reflects that DSI service and DSI conservation are not linked. Instead, the Regional Council is directed to study "conservation measures reasonably available to direct service industrial customers and other major consumers * * * and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices." § 4(e)(4), 16 U.S.C. 839b(e)(4). The study that Congress provided is far removed from the affirmative obligation that APPA proposes.

d. Respondents dispute (CL Br. 32-33, 41) our position that one of the benefits the DSI obtained in the Regional Act was increased quality of top quartile service. In particular, they point (*id.* at 41 n.83) to testimony before Congress by an attorney representing the DSIs in which he spoke of a reduction in the quality of DSI power. This testimony has been taken out of context. In fact, it refers not to the top quartile—the only portion of the DSI load at issue in this case—but, rather, to new restriction rights that the Act imposes on the *second* quartile. Under the Regional Act, BPA may protect its firm loads against shortages caused by power plant delays, conservation shortfalls, and unpredicted power plant outages by new rights to interrupt the DSI's second quartile. See H.R. Rep. 96-976, *supra*, Pt. II, at 48-49; Pet. App. E106-E107. Thus, the second quartile, which provided firmer power to the DSIs under the 1975 contracts, is now subject to interruption under increased circumstances. See Pet. App. H1-H9; See J.A. 21. To this extent the second quartile provides a lower quality of power than it did before. See S. Rep. 96-272, *supra*, at 28; Pet. App. F57; H.R. Rep. 96-976, *supra*, Pt. I, at 62; Pet. App. D123-D124; H.R. Rep. 96-976, *supra*, Pt.

II, at 48; Pet. App. E106-E107. Cf. *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. Pt. 1, at 152 (1978) (testimony of Harry Helton of Reynolds Metals Co.).

While this testimony does not detract from our position concerning the *top* quartile, it does point out that Congress clearly intended that some changes be made in DSI service under the Regional Act. See H.R. Rep. No. 96-976, *supra*, Pt. I, at 62-63; Pet. App. D124 ("The Committee amendment calls for new DSI contracts. The amendment does not require that they be identical to the current contracts concerning reserves, credits, and other matters, but provides BPA with considerable flexibility to prepare and negotiate contracts and adopt rates that insure that conditions relating to reserves are not so stringent as to render the reserves provided by the DSI's largely ineffective.").

This goes a long way towards showing that respondents are incorrect in urging that the Regional Act simply maintained the status quo for DSIs. Changes were clearly made, as they were for all customers, in order to fashion a legislative allocation scheme that resolved, as Congress saw fit, the needs of competing customers. These changes were made as part of a complex overhaul of power allocation in the Pacific Northwest in the manner Congress deemed most effective to ensure that all classes of customers received their full power requirements from BPA.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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